DOCUMENT RESUME

ED 328 506 SO 030 464

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TITLE Publius and the Contemporary Court.
SPONS AGENCY Boston Univ., MA. National Center for America's Founding Documents.
PUB DATE Sep 90
NOTE 14p.; Paper presented at the Symposium: The Federalist Papers. (Cambridge, MA, September 17, 1990). For a related document, see SO 030 465.
PUB TYPE Speeches/Conference Papers (150) -- Reports - Descriptive (141)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Citizenship Education; *Constitutional History; *Court Role; Courts; *Governmental Structure; Government Role; Secondary Education; Social Studies; United States History
IDENTIFIERS *Federalist Papers; *Supreme Court; United States Constitution

ABSTRACT

The proper role and function of the Supreme Court in the United States' system of government has been a matter of great controversy in recent years. "The Federalist Papers," specifically the documents written by "Publius," have much insight to contribute to this debate. In "Federalist #78," Publius makes the case for the power of judicial review, the power to nullify acts of the legislature that are contrary to the provisions of the U.S. Constitution. This is a significant power to rest in the hands of the Supreme Court, yet Publius sees the proper role of judges as quite circumscribed--limited to the enforcement of the constituent will of the people as that will finds expression in the Constitution. Publius's constitutional morality thus distinguished between "judgment" and "will," with will and its decision making according to subjective preferences being the peculiar province of the legislature--a place forbidden to courts. By examining the views of Publius, citizens see that the judicial activism of recent decades rests upon a fundamentally different view of the responsibilities and powers of the nation's institutions, particularly the judiciary. One concern that stands out above all others is whether judicial activism of any variety is compatible with the republicanism bequeathed to the nation by the Founding Fathers. (DB)

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PUBLIUS AND THE CONTEMPORARY COURT

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SO 030 164

The Federalist Papers, over two centuries after their first appearance, not only remain America's most substantial contribution to political philosophy, they present us with standards or bench marks against which we may measure and judge of our contemporary political institutions and practices. The most interesting of these standards or bench marks are to be found in what can be termed the "constitutional morality" that permeates these papers. This constitutional morality consists in large part of "do's" and "don'ts" -- unwritten rules, standards, and guidelines -- that were to provide the morality necessary for the constitutional machinery to operate as intended. Put another way, this constitutional morality urges upon rulers and ruled alike standards of behavior that render the Philadelphia Constitution a coherent whole -- standards that are also necessary for the maintenance and perpetuation of the political order which the Constitution creates.

In some cases, this morality has become a part of our collective being. One of the major arguments, for instance, that has been used against amending the Constitution -- whether it be with regard to flag burning, voluntary prayer, or a balanced budget -- has been that we should not trivialize our Constitution; that we should use the amendment power only as a last resort to correct what are generally agreed to be flaws or significant omissions. Still another element of this morality -- one that only occasionally comes to the fore and then to little avail -- is that the people ought not to tolerate representatives who exempt themselves from the operations of the laws they pass;

that the provisions of the law should apply equally to both ruler and ruled alike.

While this constitutional morality of which I speak is nowhere to be found in the written constitution, it, nevertheless, serves to provide an extremely important dimension of the context in which the institutions established by the Constitution are to operate.

Now I begin with these observations because the matter under consideration -- the relevance of The Federalist to the current controversy surrounding the proper role and function of the Supreme Court in our system of government -- involves us so deeply with Publius's constitutional morality. Indeed, I cannot think of another constitutional issue where this morality plays a more significant role.

Consider, to begin with, that one of America's contributions to the art of government is an independent judiciary coordinate with the legislative and executive branches. Prior to this development the judiciary had been conceived of as an adjunct to the executive arm. Then consider as well that we had devolved upon a new conception of constitutionalism -- at least one that represented a departure from the English experience. As Publius put this matter in Federalist #53, there is an "important distinction so well understood in America between a constitution established by the people, and unalterable by the government; and a law established by the government, and alterable by the government." "Wherever," he continues, "the supreme power of

legislation has resided, has been supposed to reside also, a full power to change the form of the government." But this, he goes on to inform us, is not the case in the United States where the government or its agencies are not paramount to the Constitution.

To these considerations we must add one more concerning the role of the judiciary. Publius instructs us in Federalist #78 that it is within the special province of the courts to interpret the Constitution or the fundamental law. Here he informs us as well -- and this certainly falls into the category of constitutional morality -- that the courts have the power of judicial review; the power to nullify acts of the legislature that are contrary to the provisions of the Constitution.

In sum, we have a judiciary, for the first time an independent and coordinate branch, with the special responsibility of authoritatively interpreting the Constitution which is the fundamental or paramount law. In this context, the proper role and function of the Court -- and Publius was keenly aware of this -- depended on the observance of an appropriate constitutional morality on the part of the courts, the other branches, as well as the people. And, what is more, this morality had to answer several critical questions, not the least of these being that posed by certain Antifederalists -- Brutus being the most notable -- to the effect that the Supreme Court, armed with the power of judicial review, would eventually emerge as the most powerful branch of government. Indeed, he pictured very dire consequences. In his words, the courts "will give the sense of every article of the constitution, that may from time to

time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution that can correct their errors, or control their adjudications. From this court there is no appeal."

We may say that Brutus was the first critic of judicial activism or of what is fashionably called today, non-interpretivism.

Publius, of course, was constrained to answer these and like criticisms. He did so, primarily in Federalist # 78, by setting forth a constitutional morality that he believed would and should determine the role and function of the courts. And because his remarks and analysis in this connection are so relevant today in the ongoing disputes over the legitimate powers of the courts, particularly the Supreme Court, they deserve our attention.

Federalist # 78 is best known as presenting the case for judicial review -- though we should note that the purport of the essay is a defense of judicial tenure for life. It is also an extremely important essay, constituting the most authoritative statement we have that the Framers intended judicial review.

Now to put Publius's teachings regarding the role of the judiciary into proper perspective, we are obliged at the outset

to deal with his argument in defense of life tenure, during good behavior, for judges. In this defense we cannot help but note his emphasis on the feebleness of the judicial branch. The judiciary, he tell us -- in contrast to the legislative and executive branches -- "will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to injure them." He assures that the judiciary "can take no active resolution whatever"; that it has no power over the "sword or the purse, no direction over the strength or of the wealth of the society;" that it possesses "neither Force nor Will, but merely judgment" and that "it must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." "The general liberty of the people," he continues, "can never be endangered" by the judiciary alone. For these reasons he contends that the "judiciary is beyond comparison the weakest of the three departments of power" and, in a footnote, he cites Montesquieu to the effect that "of the three powers ..., the JUDICIARY is next to nothing."

He considers life tenure as indispensable to preventing a union between the judiciary and either the executive or legislative departments -- a union which, for reasons he has spelled out much earlier in these papers on the separation of powers, would result in tyranny.

But he saw still another reason for life tenure. It would provide for the "complete independence" of the courts, an independence which he regarded as "peculiarly essential in a limited constitution." And he is clear as to what he means by a

limited Constitution: it is "one which contains certain specified exceptions to the legislative authority; such for instance that it shall pass no bills of attainder, no ex post facto laws, and the like."

Even though, let us take care to note, these limitations are "exceptions to legislative authority"; they involve well known rights -- protection against bills of attainder and ex post facto laws -- which had emerged from the English tradition, Publius immediately proceeds to deal with the charge that the courts' authority to uphold these limitation implies "a superiority of the judiciary to the legislative power." What follows is an explication of the fundamental law theory. "There is no position which depends on clearer principles," he writes, "than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid." And he continues: "It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people [that is, Congress] to substitute their will to that of their constituents. It is far more rational to supposed that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep

the latter within the limits assigned to their authority."

In essence what Publius tells us is that the Constitution embodies the constituent will of the people; that this constituent will alone can give form and substance to the fundamental law; that this constituent will sets limits on the political will of the people -- that is, the political will expressed through those institutions created by the constituent will. And, as he tells us later in this essay, the Constitution -- formed by the constituent will of the people -- can only be altered through the amendment process, by some "solemn and authoritative act" -- not by the political will of the people expressed through legislation. In these terms we can understand why he would argue that the power of the judiciary to declare an act of Congress unconstitutional does not "suppose a superiority of the judicial to the legislative power;" that, on the contrary, "It only supposes that the power of the people is superior to both ... that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the" fundamental law.

In these terms too, we come to see why Publius's position restricts the latitude of the judges to the enforcement of the constituent will as that will finds expression in the Constitution. Put in other terms, Publius's fundamental law theory in defense of judicial review rests upon the courts being faithful interpreters and expositors of this constituent will.

It seems clear that, in terms of our contemporary controversies surrounding the role and function of the Supreme Court, this fundamental law theory places Publius in the camp of the interpretivists or the original intent school of thought.

This leads us straightaway to what is perhaps the most interesting aspect of Publius's presentation in Federalist #78. What if the courts (or the Supreme Court) should ignore this element of our constitutional morality; what if the courts were, as he puts it, to "substitute their own pleasure to the constitutional intentions of the legislature?" What if, he goes on to ask, the courts were to exercise "WILL [the prerogative of the legislature] instead of JUDGMENT"? He does not answer this question satisfactorily in #78. He avoids the issue by remarking that if the courts were to exercise WILL instead of JUDGMENT, "the consequence would ... be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body." In other words, if judges are bent upon exercising WILL, they should seek election to the legislature.

Later, in Federalist 81, he is to downplay the prospect of judicial "encroachments on the legislative body" by maintaining that such a danger "is in reality a phantom." Such encroachments, he continues may happen "now and then ... but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system." So much, he contends, "may be inferred with certainty from the general nature of the judicial power, form the objects to which

it realties; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force." But the "complete security" from such encroachments, he believes, is found in "the important constitutional check," the power of impeachment and removal of judges vested in Congress.

The basic issue raised in Publius's treatment ultimately comes down to whether there is a difference between WILL and JUDGMENT. Clearly he thought so. And, no doubt, he had in mind the distinction between WILL and JUDGMENT that marks the common usage of these words: JUDGMENT being associated with evaluations, comparisons and the like according to more or less objective standards or principles, whereas the exercise of WILL carries with it the idea of decision making according to subjective preferences. Such a view conforms with his belief that WILL was the peculiar province of the legislature, not the courts.

But this is not all. Publius provides us with other, more concrete -- albeit implicit -- operational standards for determining whether the courts have transgressed their proper boundary by moving from the realm of JUDGMENT over to that of WILL. One of these we have already touched upon. Publius charges the courts with the responsibility of invalidating laws -- and here I quote -- "contrary to the manifest tenor of the Constitution." The words "manifest tenor" render Publius's constitutional morality clear enough: The court is only to nullify those laws that contravene clear, unambiguous provisions of the Constitution. It is in this context, I should note, that

he offers up the examples of the prohibitions on ex post facto laws, bills of attainder, "and the like" -- prohibitions on practices easily defined and readily understood in light of the English tradition. Publius's teachings on this score, in effect, warn us to be wary of those who feel it within the courts' province to decide according to the "spirit" of the Constitution.

In this vein, Publius sets forth another standard, that of "irreconcilable variance." More exactly, before the courts can set aside a law as unconstitutional, there must be --as Publius would have it at least -- an "irreconcilable variance" between the law and the Constitution. Otherwise, the court is obliged to let the law stand. This we can see upon reflection is a very strict test because it places a burden upon the courts to show this irreconcilable variance; to show that the statute or the constitutional provision may not be reasonably interpreted to produce a compatibility between the two.

In discussing the need for judges who are well versed in the law, Publius reveals a good deal about his view of the role and function of the judiciary by offering up still another standard for differentiating between WILL and JUDGMENT. "To avoid an arbitrary discretion in the courts," he writes, "it is indispensable that they should be bound down by strict rules and precedents." In practice this means that we have grounds for suspecting that the courts are, indeed, exercising "arbitrary discretion" or WILL, the more we find them abandoning precedent.

In sum, Publius presents the case for what can be termed "traditional" or classical version of judicial review"; a form of judicial review which many, if not most, of the severest of critics of the modern Supreme Court accept as fundamentally sound. And the reasons for this are not are to see. The constitutional morality underlying this traditional version of judicial review stands athwart the modern activist versions on key concerns. Under the traditional version, very seldom would the Supreme Court ever find the occasion to invalidate a law of Congress. More importantly, under this version the courts' role is a negative one; certainly not that of taking positive action to correct perceived wrongs in society. That is, the Court's role, though critically important, is limited to preserving the integrity of constituent will. And, most certainly this version does not countenance decisions grounded on the "spirit" of the Constitution.

Clearly Publius's views provide us with a constitutional morality -- complete with relatively specific rules and standards -- for determining just how far we have departed from the Framers' understanding of the proper role and function of the judiciary. But, I should also note by way of conclusion, that they point to an even more important issue. In Publius's system the role of the judiciary was tailored or fashioned to accord with the principles of a constitutional republic, one wherein the responsibility for setting forth far reaching policy was confined to the elected branches of government. The judicial activism of recent decades, however, rests upon a fundamentally different

view of the responsibilities and powers of our institutions, particularly the judiciary. Thus, one concern that perhaps stands out above all others is whether judicial activism of any variety is compatible with the republicanism bequeathed to us by our Founding Fathers; or, to put this more strongly, whether this activism amounts to little more than judicial tyranny. And I am reasonably certain that if Publius could somehow join us this evening, he would share this concern.